No. 2-91-0735

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NEIL HAMBLY and WAYNE CAPALBY, Plaintiffs-Appellants, v. THE OSWEGOLAND PARK DISTRICT, Defendant-Appellee.	Appeal from the Circuit Court of Kendall County. No. 91-CH-5 Honorable James M. Wilson, Judge, Presiding.

ORDER

Plaintiffs, Neil Hambly and Wayne Capalby, sued to enjoin defendant, the Oswegoland Park District, from depositing allegedly hazardous waste on land owned by defendant and situated adjacent to plaintiffs' property. After an evidentiary hearing on plaintiff's motion for a preliminary injunction, the trial court granted defendant's motion for a directed judgment on the issue of a preliminary injunction. We have jurisdiction pursuant to Supreme Court Rule 307(a) (134 Ill. 2d R. 307(a)). Plaintiffs argue that the trial court abused its discretion in refusing to grant the preliminary injunction. Plaintiffs assert that the evidence at the hearing established that defendant has been using the park as an unauthorized dump and that this activity should be enjoined because it is a nuisance per se. We affirm.

Defendant owns Saw-Wee-Kee Park (the park), a 150-acre tract along the east bank of the Fox River in Kendall County. The park

is part of a tract that was originally used for strip mining. After the State acquired the property, defendant acquired the park from the State in 1963. Plaintiff Hambly has resided on Sundown Lane in Yorkville, across from the southern end of the park, since 1985. Plaintiff Capalby has resided on Sundown Lane in Yorkville, 400 to 500 feet northeast of the park, since 1979.

On April 5, 1991, plaintiffs filed their complaint to enjoin defendant's alleged dumping of hazardous waste and refuse on park premises. The complaint was filed originally as a class action. Plaintiffs later elected to proceed as individuals only.

The complaint alleged that defendant owned the park and that plaintiffs had observed dump trucks traveling to the park via Sundown Lane. The complaint then alleged, on information and belief, that the trucks were carrying hazardous waste and refuse into the park. Plaintiffs alleged further that they had repeatedly advised Bert Gray, defendant's executive director, of their belief that hazardous waste was being deposited on defendant's property; that they had repeatedly requested that this transport and dumping cease; that Gray had told them that the trucks were transporting "fill" to the park at defendant's request; that Gray further told plaintiffs that defendant had not acquired and did not need permits for this dumping; and that Gray informed plaintiffs that defendant would continue to invite the dump trucks onto the property to deposit fill onto the premises.

The complaint then alleged the following matters, all on information and belief: that as a result of defendant's dumping, various types of hazardous waste materials were present in the

park; that defendant had covered certain of these materials with dirt or gravel; that the dumping would lessen the value of plaintiffs' property because of the increased truck traffic along Sundown Lane and the damage to plants and wildlife along the river; that leakage of hazardous materials threatened to contaminate plaintiffs' drinking water wells; and that defendant's intended present and future use of the park was for public recreation, including, among other things, hiking and horse trails and boating.

Plaintiffs alleged that they lacked an adequate remedy at law and that defendant's actions threatened them with irreparable injury. The complaint prayed that the court enjoin defendant from continuing to cause or allow hazardous waste and refuse to be deposited on the property. Plaintiffs also requested that defendants be enjoined from materially altering the present condition of the property pending a complete examination of the nature and extent of the waste materials deposited on the site.

On April 4, 1991, defendant received an Administrative Warning Notice from the Illinois Environmental Protection Agency (IEPA). The notice and other documents discussed herein were admitted into evidence at the hearing on the preliminary injunction. The notice stated that on February 22, 1991, IEPA employee Mary Glynn investigated the park to determine whether defendant's operation of the property complied with portions of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1001 et seq.) and administrative regulations made pursuant to the statute relating to waste generation and disposal. The

notice ordered defendant to submit in writing, within 15 days, the reasons for the apparent violations noted in Glynn's report. The notice told defendant that, in order to avoid further administrative or legal enforcement, defendant would, within 60 days, have to: (1) immediately cease all open dumping at the site; (2) remove all waste to a landfill permitted by the IEPA; and (3) determine whether the solid waste generated at the site was hazardous waste.

Glynn's inspection report, attached to the notice, listed five apparent violations of the Illinois Environmental Protection Act: (1) causing or allowing litter; (2) causing or allowing the deposition of waste in standing or flowing waters; (3) causing or allowing the development or operation of a solid waste management site without an IEPA permit; (4) causing or allowing the open dumping of any waste; and (5) conducting a waste storage, waste treatment or waste disposal operation without an IEPA permit.

In her report, Glynn related that she undertook the investigation in response to a citizen complaint. Plaintiff Hambly, one of three people who accompanied Glynn on the inspection, told her that the most recent deposit of unclean fill material in the park occurred in January 1991 in a 4,500 square foot area. In one part of this area, Glynn observed piles of scrap metal, railroad ties, tires and oil drums; piles of metal reinforced concrete in another part; and piles of styrofoam and scrap metal in the center of the area. Hambly told her that a section of the park south of this area was filled with debris that had been covered in fall 1988 and that the IEPA had investigated this

dumping in fall 1988 and issued a citation. Hambly also told Glynn that in 1985 defendant had allowed the dumping of, and then covered, unclean fill in a wetland north of the current fill area. About a half mile northeast of this wetland, Glynn observed 20 to 25 drums that had been dumped along the side of a small hill. Some of the drums were full. A few had corroded, exposing a solid paintlike substance inside.

Glynn took two samples from an apparent leachate seep along the banks of the river, about one-half mile southwest of the current filling area. Hambly told her that no dumping had occurred there recently.

On March 7, 1991, Glynn collected a sample of a "hard, multicolored solid" from one of the corroded drums in the northeastern section of the park. IEPA tests done at her request revealed concentrations of cadmium and chromium well below Federal hazardous waste standards, but a concentration of lead in excess of the Federal standard.

On April 5, 1991, Gray wrote to Dean Smith, an Oswego resident living on Sundown Lane. Gray informed Smith that defendant had received an administrative warning notice from the IEPA listing a series of violations resulting from Smith's activity on defendant's property. Gray told Smith to remove any unclean fill from the area of latest filling by April 21, 1991, to remove all other material from the property by May 12, 1991, and to refrain from placing any fill material, clean or otherwise, on defendant's land.

On April 10, 1991, Gray wrote to the IEPA. He explained that defendant was attempting to develop a small part of the park for public use and that defendant had understood that it could fill valleys left by strip mining with clean fill. Gray stated that defendant had allowed Dean Smith to bring clean fill into the area, but, as Smith had brought in much other material, defendant had ordered Smith to remove all "nonclean material." Smith had agreed to comply.

On April 10, 1991, the United States Army Corps of Engineers notified defendant by letter that, based on a March 28, 1991, inspection of the park, it had determined that defendant was, without authorization, placing fill material into United States water in violation of Federal law. The letter ordered defendant to cease and desist from all unauthorized activities at the site.

The record contains evidence of defendant's previous difficulties with the IEPA. On December 23, 1982, Gray wrote to Don Davis, a resident of Yorkville, explaining that defendant, aided by two experts, had sampled the contents of barrels deposited in the park. The barrels were located in a part of the park that was formerly the "Oswego Dump." Most of this area, although not that part containing the barrels, had been covered when the dump was closed. Tests showed that the material from the barrels and ground consisted of hardened or dried matter which was "virtually non-biodegradable" and therefore no hazard to any aquifer.

On December 9, 1983, the IEPA wrote defendant to request the removal of 55-gallon drums left in the park by the previous owner, Armour-Dial, Inc. On February 19, 1985, the IEPA informed

defendant that Armour-Dial, Inc., had removed 87 55-gallon drums of nonhazardous waste from the park and that approximately 50 drums (not the property of Armour) were left at the site.

On December 9, 1988, the IEPA sent defendant a "Compliance Inquiry Letter" stating that an inspection of the park the previous month revealed apparent violations of provisions of the Illinois Environmental Protection Act relating to the storage of waste. The letter ordered defendant to inform the IEPA of the reasons for the apparent violations and warned defendant of the possible penalties involved. Enclosed with the letter was the inspector's report, in which he recounted noticing that potentially hazardous materials had been deposited into an open dump. The dump was in a dry creek bed which would empty into the Fox River if water were present. Eert Gray had told the inspector that defendant had permitted Dean Smith to deposit clean fill material in the park. The IEPA had issued no permit for the site.

On January 11, 1989, Gray wrote to the IEPA, explaining that defendant, in preparing the park for recreational use, had allowed local earth moving companies to deposit clean fill at the site, and that during this process, some unacceptable matter was deposited. In November 1988, Hawk Earthmoving, Inc., informed the IEPA that it had removed debris that it had improperly deposited into the area. In January 1989, the company informed Gray that it had completed the necessary cleanup.

On May 14, 1991, defendant filed its answer to the complaint. Defendant admitted holding legal title to the park.

Defendant conceded that certain trucks had carried materials to the park via Sundown Lane, but denied that such materials were "hazardous waste and refuse." Defendant stated that it had allowed the deposit of clean fill onto a small part of the park for the period necessary to complete development of that area for recreational purposes. Defendant conceded that railroad ties, shingles, pieces of metal and other materials had been seen on the property, but that some of this material had been present before defendant took title to the property. Defendant demanded strict proof that any hazardous waste had been deposited onto the former dump site. Defendant denied that its activities posed a threat to plaintiffs' property.

The trial court heard plaintiffs' evidence on the motion for a preliminary injunction on May 3, 1991, and May 24, 1991. Mary Glynn recounted her investigation of the site earlier in the year. She explained that she had no on-site knowledge of the area prior to February 1991. She sampled the contents from only one of the drums located on the side of the small hill. The drums were in a wet area, but she could not recall if any of them were partly submerged. The sample, which was solid, revealed a concentration of lead above the Federal standard, meaning that the sample should be considered hazardous waste. She estimated from the drum's condition that the drum had been at the site "at least over ten years." On a later visit, Glynn took water samples from the creek bed. The results of this test were not yet available at the time of trial.

Michael Shotton, a geologist, was plaintiffs' expert witness. He prepared an aerial photograph and a geologic cross section of the park area and also personally observed the site. The geologic diagram included markings for water wells in the area but did not depict any of plaintiffs' wells. Shotton did not personally inspect any wells. Shotton explained that underneath the area's thin ground surface was a permeable layer of sand and gravel. Further below was the Maquoketa shale, a formation that would retard the downward flow of groundwater but was not totally impermeable.

Shotton testified that under some circumstances, the subsurface flow of water through the sand and gravel might not go toward the Fox River. Water pumped from a well bore could cause the formation of a "cone of depression" whereby the water would be "sucked into the well radially" around the well bore, causing the water to flow "up hill." Substances that could be dissolved in water, either via precipitation or within the groundwater itself, could travel through the permeable layer to the cone. Although the Maquoketa shale was almost completely impermeable, it was possible that well bores within the shale could permit water to flow downward into the aquifer beneath the shale. Shotton acknowledged that wells constructed in the area were surrounded by impermeable casings that went down a short distance into the shale.

Plaintiff Hambly testified that his home, located one-half to three-quarters of a mile from what he characterized as defendant's dump, received its water from a well on his property.

The well was about 530 feet deep, and a pump was set at about 380 feet. He had made no tests of the water from his well. The water had a good appearance and a slight sulfurous odor. He had not drunk water from the well for about three months before the hearing.

Hambly visited the park shortly before the hearing and also in 1988. He took numerous pictures of the site and of the trucks that had recently been hauling material to the park. The trucks he had photographed started using the park in late February 1991. Hambly had last observed a truck actually dumping material early in April 1991. The trucks in the photographs had dumped asphalt, concrete and debris from a recent tornado. Dumping had been going on since some time in 1988.

Hambly called Bert Gray late in July 1988 to inquire about the fill activity. Gray assured Hambly that the fill would not adversely affect surface water flow or the level of the water table.

Plaintiff Wayne Capalby testified that he had walked through the park about five times, beginning February 9, 1991. He took a number of photographs, which were admitted into evidence, of the considerable amounts of debris that he saw there. Among items he had noticed were over 50 55-gallon drums.

On the afternoon of February 6, 1991, Capalby returned from work and noticed a number of large trucks driving past his property toward the park. The trucks appeared to be dumping material into what looked like a waterway along the riverfront.

Capalby called the township road department, and the next day a sign indicating a load limit of 12,000 pounds was set up.

On February 6, 1991, Capalby called defendant's offices; the next day, Gray called him back. Gray told Capalby to get used to the traffic, as the trucks would be going to the park to deposit clean fill for three, four or five years more. Gray explained to Capalby that defendant did not need a permit (and did not intend to obtain one) because it was placing only clean fill onto the property. On February 27, 1991, Capalby again saw trucks hauling fill material to the park. The trucks sometimes went off the roadway and onto the grassy area in front of Capalby's house. Capalby admitted that he did not own this area, although he paid to maintain it. Late in March, Capalby noticed a trailer for a bulldozer headed toward the park. However, he admitted that by March 1, 1991, the trucks had stopped bringing new materials to the park.

Capalby's home had a well 310 feet deep with a pump set at 260 feet. He took a sample of water from the well for analysis by ARRO Laboratories of Joliet. Capalby testified that he had been experiencing a number of health problems in the last year. However, the court sustained a defense objection to any testimony as to what Capalby or his doctors believed had caused the illnesses.

Joan Rolih, director of ARRO Laboratories, explained that she oversaw a test of Capalby's water sample, which ARRO Laboratories received on April 15, 1991. The test failed to show measurable amounts of any heavy metals. The test also revealed a

concentration of 26.18 parts per million total organic carbon. Although this level compared to those found for industrial waste water and monitor wells from landfills, Rolih noted that tests from such sites also revealed traces of heavy metals, which were absent here. Furthermore, there was no legal standard for total organic carbon concentration. Some organic carbons are good and occur naturally, and the relatively limited test performed could not reveal how much of the total organic carbons in the sample were of this type. Also, the sample had not been compared to any from wells in the area, and Rolih did not know the background reading of the water in the area.

Bert Gray testified that he had been defendant's executive director since 1980. He admitted that defendant had no records of what had been deposited on the site when it had been operated in part as a dump, no records of when any item deposited there had been placed there, no inventory of what had been dumped, and no communication from the IEPA that the park was a proper dump site. Gray explained, however, that the "old dump" had been closed before the IEPA came into existence. Defendant had filed no records with the IEPA regarding the deposit of materials onto the site.

Gray explained that the material brought onto the site within the last two years consisted of clean fill that trucks had been bringing into a specific small area of the park that was being developed for public recreational use. The "nonclean fill" portrayed in plaintiffs' photographs had been placed there by Dean Smith in the area adjacent to Smith's residence. Smith had

no contract with defendant to bring in these materials, and Gray had ordered Smith to removed the unauthorized junk. Gray also testified that fill material questioned by the IEPA in 1988 had been brought in by an Oswego trucking firm.

According to Gray, the barrels that were the subject of the 1982 citizen complaint and defendant's subsequent investigation were the same barrels from which Mary Glynn had drawn a sample for testing. Defendant had not, since its initial investigation, tested the contents of the barrels. Gray stated that in 1985 and 1988, but not in 1982, material not fit under IEPA standards for deposit in the park was placed there.

Gray did not know the source of the asphalt shingles, railroad ties, scrap metal, styrofoam or reinforced concrete that the IEPA had recently told defendant to remove. The wetland within the park had been filled in 1988 with clean fill, the source of which Gray did not know. Defendant had made no test of the leachate sampled by Glynn and did not intend to do so.

Gray acknowledged that at no time while he was executive director did defendant have an IEPA permit to operate the park as an open dump. The subject had not been raised at defendant's board meetings at any time during Gray's tenure. In 1991 Gray had observed roughly 20 to 25 truckloads of unclean fill material in the park, none of it in the area of the "old dump."

At the end of plaintiffs' evidence, defendant moved for a directed finding and judgment (Ill. Rev. Stat. 1989, ch. 110, par. 2-1110) on plaintiffs' motion for a preliminary injunction. The court granted defendant's motion. In explaining its

decision, the court stated in a written order that plaintiffs had met none of the prerequisites for injunctive relief.

The court held initially that because the allegations in plaintiffs' complaint were made on information and belief, the court could not consider the complaint.

The court found further that plaintiffs had failed to establish that defendant's conduct harmed them or their property or that plaintiffs were exposed to any grave or immediate peril by any of defendant's acts. In concluding that plaintiffs had failed to show that they had no adequate remedy at law, the court reasoned that defendant was already subject to cease and desist orders from the IEPA and the United States Army Corps of Engineers pending investigations by those agencies and that these orders provided the same relief that plaintiffs sought in this action.

Plaintiffs timely appealed the denial of the preliminary injunction. Although the trial court made its ruling before defendant introduced any evidence at the hearing, plaintiffs urge us not merely to reverse the directed finding for defendants but also to remand with directions to grant the preliminary injunction. Furthermore, although plaintiffs appeal interlocutorily from the denial of preliminary relief, their brief argues the merits of the suit, and they urge us to rule that defendant's actions constitute a nuisance per se which must be enjoined. Defendant, in turn, takes issue with plaintiffs' characterization of the evidence and their conclusions about the merits of the case.

We remind the parties, however, that the purpose of a preliminary injunction is not to determine controverted rights or to decide controverted facts or the merits of the case. (Buzz Barton & Associates v. Giannone (1985), 108 Ill. 2d 373, 386.) Rather, the purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits of the case. (Cullen Electric Co. v. Cullen (1991), 218 Ill. App. 3d 726, 732; Armstrong v. Crystal Lake Park District (1985), 139 Ill. App. 3d 991, 996.) The primary issue in this appeal is thus whether the trial court erred in not granting plaintiffs the preliminary relief that they requested: an order preventing defendant from disturbing the condition of the park pending further investigation of the materials present on the site. We note that in ruling on defendant's motion for a directed finding the trial court was required to weigh plaintiffs' evidence and consider its quality, and we will not reverse its decision unless that decision was against the manifest weight of the evidence. Kokinis v. Kotrich (1980), 81 Ill. 2d 151, 154.

A preliminary injunction is an extraordinary remedy to which a trial court should resort only where an extreme emergency exists and serious harm would result without the injunction. (Buzz Barton, 108 Ill. 2d at 387-88; Northrop Corp. v. AIL Systems, Inc. (1991), 218 Ill. App. 3d 951, 954.) Injunctive relief is an extraordinary remedy which should be used only when the circumstances clearly require it. (Northrop, 218 Ill. App. 3d at 954.) To obtain preliminary injunctive relief, a plaintiff must show that: (1) he has a clearly ascertained right which

needs protection; (2) he will suffer irreparable injury without the injunction; (3) there is no adequate remedy at law for this injury; and (4) there is a likelihood of success on the merits. (Buzz Barton, 108 Ill. 2d at 387.) In addition to considering whether these criteria have been met, the trial court must also conclude that the potential harm to the movant from the refusal to grant the injunction outweighs the potential harm to the nonmovant from the issuance of the injunction. (Buzz Barton, 108 Ill. 2d at 387; In re Marriage of Stamberg (1991), 218 Ill. App. 3d 333, 336-37.) The decision to grant or deny a preliminary injunction is for the discretion of the trial court, and the court's decision will be upheld unless it is against the manifest weight of the evidence. Northrop, 218 Ill. App. 3d at 954.

We conclude that the trial court did not abuse its discretion in directing judgment for defendant. We reiterate that plaintiffs' brief on appeal does not squarely address the issues relevant to the denial of the injunction; rather, it argues that plaintiffs should prevail on the merits because the evidence at the preliminary hearing established that defendant's operation of the park constitutes a nuisance per se. Not only does plaintiffs' approach confuse the issues appropriate to preliminary relief with those relevant to the merits, but, equally importantly, it does not appear that plaintiffs raised the theory of nuisance per se either in their loosely drafted complaint or elsewhere before the trial court. Rather, plaintiffs argued that they were entitled to relief against an alleged private nuisance because of the effect of defendant's actions on their property.

Although plaintiffs argued that the evidence showed defendant was operating an open dump in violation of the Illinois Environmental Protection Act (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1021), they did not sue under that statute, and a suit based on the statute itself would have required plaintiffs to exhaust their administrative remedies first (Ill. Rev. Stat. 1989, ch. 111 1/2, par. 1045(b)).

It is elementary that issues not raised at the trial level ordinarily may not be raised on appeal. (Shell Oil Co. v. Department of Revenue (1983), 95 Ill. 2d 541, 550.) Although we might therefore affirm the trial court simply on this basis, we also conclude that the denial of preliminary relief was proper based on plaintiffs' failure to demonstrate that irreparable injury would result from the failure to grant preliminary relief pending a decision on the merits.

Plaintiffs argue that the undisputed evidence shows that defendant has been operating a hazardous waste dump which is a nuisance per se. However, plaintiffs' complaint did not adequately raise this issue. We note that the allegation of the existence of hazardous waste at the park was made only on information and belief. A complaint for a preliminary injunction must plead facts clearly establishing a right to injunctive relief, and allegations consisting of mere opinion, conclusion or belief are insufficient to support the issuance of the writ. Hough v. Weber (1990), 202 Ill. App. 3d 674, 684.

Furthermore, the evidence at the hearing failed to show that plaintiffs were threatened with irreparable injury pending a

decision on the merits. We make this conclusion based on three reasons.

First, plaintiffs' evidence, their arguments to the contrary on appeal notwithstanding, utterly failed to support more than mere speculation that defendant's activities constituted a private nuisance. To recover for private nuisance, plaintiffs ultimately must show that defendant has caused or threatens to cause a substantial and unreasonable interference with plaintiffs' rights in their land. (Village of Wilsonville v. SCA Services, Inc. (1981), 86 Ill. 2d 1, 21-22.) Aesthetic displeasure or decreased property values do not, without more, support a cause of action for nuisance. (Village of Goodfield v. Jamison (1989), 188 Ill. App. 3d 851, 861; Carroll v. Hurst (1982), 103 Ill. App. 3d 984, 990.) Also, for a court to restrain a prospective nuisance, there must be a high probability, and not just a contingent or uncertain possibility, that the threatened injury will occur. Wilsonville, 86 Ill. 2d at 25.

Thus, even on its own terms, plaintiffs' argument on the merits is unpersuasive. Although plaintiffs are correct that the evidence was undisputed that defendant had allowed great quantities of junk to accumulate in the park, plaintiff presented no evidence which showed that the accumulations invaded plaintiffs' legally protected rights. The sole evidence of "hazardous waste" was the test result showing that the hard substance scraped from a barrel at least 10 years old contained an unsafe amount of lead. The evidence at the hearing, however, in no way allowed an inference that any of this matter made its way into plaintiffs'

water or onto plaintiffs' property. Moreover, the barrels were not among the items that defendant had trucked onto the site over plaintiffs' protests, and the finding that one such barrel contained an unacceptable amount of lead in no way allowed an inference that the future "dumping" activities plaintiff sought to enjoin posed any similar threat. Plaintiffs' argument on the merits is simply unpersuasive.

Second, the trial court specifically found, and plaintiffs do not now dispute, that defendant is already under "cease and desist" orders from the IEPA and the United States Army Corps of Engineers. The IEPA specifically commanded defendant to "[i]mmediately cease all open dumping at the site" and to remove all waste to a landfill authorized by the IEPA. The order also required defendant to determine whether waste on the property was hazardous. In view of such a sweeping order, we are not prepared to say that the trial court went against the manifest weight of the evidence in holding that plaintiffs had not shown that they would be irreparably injured absent an order requiring defendant to leave the park undisturbed. Also, we note that plaintiff Wayne Capalby himself testified that by the beginning of March 1991, the dump trucks had ceased coming to the park.

Third, plaintiffs do not even argue on appeal that they would suffer irreparable injury from the denial of the specific type of preliminary relief that they requested at the trial level. Plaintiffs asked that defendant be enjoined from materially altering the property pending an investigation of the waste materials deposited thereon. However, the IEPA directive already

required defendant to investigate the characteristics of waste deposited at the park. Insofar as the relief requested by plaintiffs is not inconsistent with the IEPA order, it would appear to be mandated by that order already. Furthermore, whatever the effect of previous orders aimed at defendant, plaintiffs simply do not argue on appeal that irreparable injury will occur absent an order requiring that the park's landscape remain materially undisturbed for an indefinite period of time.

The trial court's finding that plaintiffs did not show the sort of extraordinary circumstances necessary for a preliminary injunction was not against the manifest weight of the evidence.

The judgment of the circuit court of Kendall County is affirmed.

Affirmed.

INGLIS, J., with BOWMAN and WOODWARD, JJ., concurring.